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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Hailei Joe, No. CV-23-02154-PHX-JJT
10 Plaintiff,
11 v.
12 Olive Branch Assisted Living LLC,
13 Defendant.
14

ORDER

15 At issue are two motions: Defendant Olive Branch Assisted Living LLC's Motion
16 for Summary Judgment (Doc. 71, D. Mot.), supported by a Statement of Facts (Doc. 72;
17 Sealed Docs. 85–99, D. SOF), and Plaintiff Hailei Joe's Motion for Partial Summary
18 Judgment (Doc. 73, Pl. Mot.), supported by a Statement of Facts (Doc. 74, Pl. SOF) and
19 attached exhibits (Doc. 77; Sealed Docs. 76, 80–83). Plaintiff filed a Response in
20 opposition to Defendant's Motion (Doc. 101, Pl. Resp.), supported by a Statement of Facts
21 (Doc. 102; Sealed Docs. 106–12, Pl. Resp. SOF), and Defendant filed a Response in
22 opposition to Plaintiff's Motion (Doc. 104, D. Resp.), supported by a Controverting and
23 Separate Statement of Facts (Doc. 105, D. CSOF). Each party also filed a Reply (Docs.
24 114, 115). The Court will resolve the Motions without oral argument. LRCiv 7.2(f).

25 **I. Background**

26 This case concerns alleged discriminatory conduct on the part of Defendant against
27 Plaintiff Hailei Joe during her stay at Olive Branch Assisted Living, a Residential
28 Addiction Treatment Facility that provides counseling, psychiatric treatment, primary care,

1 and psychological care, among other services, to its residents. (D. SOF ¶ 2.) Defendant has
 2 a contractual relationship with non-party Teri's Health Services ("THS") through which
 3 THS provides case management services and "help[s] address needs and discharge plan as
 4 needed." (D. SOF ¶¶ 4–8, Ex. 2.)

5 Plaintiff struggled with drug addiction and consequently moved into Defendant's
 6 facility for substance abuse treatment on October 18, 2022, at which time she informed
 7 Defendant's staff that she suspected she may be HIV-positive. (Pl. SOF ¶¶ 5–6, Exs. 2, 4;
 8 D. SOF ¶ 17, Ex. 7.) Plaintiff underwent blood testing from a third-party health care
 9 provider and received an HIV-positive diagnosis on November 4, 2022. (Pl. SOF ¶¶ 9–10,
 10 Exs. 4, 6.) Plaintiff avers that she promptly reported her diagnosis to Defendant upon
 11 receipt. (Pl. SOF ¶ 10, Ex. 4.) Following her disclosure, Defendant's owner Russell
 12 Appleton organized a group meeting for all the facility's residents and informed them that
 13 someone in the facility had received an HIV-positive diagnosis. (D. SOF ¶¶ 59–60, Ex. 5.)
 14 Plaintiff avers that following that meeting Appleton told Plaintiff that the facility no longer
 15 had the proper treatment plan for her, as her needs were beyond what the team could
 16 provide. (D. SOF ¶¶ 68–70, Ex. 17.) On November 7, 2022, Plaintiff was discharged from
 17 Defendant's facility and transferred to non-party Cornerstone Healing Center. (Pl. SOF
 18 ¶¶ 12–13, Exs. 4, 8, 9.)

19 Following her discharge, Plaintiff filed a Fair Housing Act complaint with the
 20 Arizona Attorney General's Civil Rights Division. (Pl. SOF ¶ 14, Ex. 10.) Additionally,
 21 Plaintiff brought this action on October 16, 2023. (Doc. 1.) In the Amended Complaint,
 22 Plaintiff raises seven claims: (1) discrimination in violation of the Fair Housing Act, 42
 23 U.S.C. § 3604 ("FHA"); (2) discrimination in violation of the Arizona Fair Housing Act,
 24 A.R.S. § 41-1491.19 ("AFHA"); (3) discrimination in violation of Title III of the
 25 Americans with Disabilities Act, 42 U.S.C. § 12182 ("ADA"); (4) public disclosure of
 26 private facts under Arizona common law; (5) retaliation under the FHA; (6) retaliation
 27 under the AFHA; and (7) retaliation under the ADA. (Doc. 19, Am. Compl. ¶¶ 23–65.) The
 28 relief she seeks includes a prayer for punitive damages.

1 On November 13 and 21, 2023, Defendant's counsel sent Plaintiff's counsel emails
 2 about the instant case and Defendant's plan for moving forward with the suit, which
 3 Plaintiff claims were threatening. (Pl. SOF ¶¶ 18–19, Ex. 13.) On December 17, 2023,
 4 Defendant filed a joint Answer and Counterclaim to the Complaint raising a claim of
 5 defamation, arguing that Plaintiff defamed Defendant by speaking to the Phoenix New
 6 Times about her experience with the facility. (Doc. 11.) Defendant continued to claim
 7 defamation in its Answer to the Amended Complaint. (Doc. 23.) After the Court permitted
 8 Defendant's prior counsel to withdraw (Doc. 31) and Defendant retained new counsel
 9 (Doc. 32), Defendant dropped the counterclaim (Docs. 35, 36).

10 The parties have now filed cross-motions for summary judgment.

11 **II. Legal Standard**

12 Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate
 13 when the movant shows that there is no genuine dispute as to any material fact and the
 14 movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v.*
 15 *Catrett*, 477 U.S. 317, 322–23 (1986). “A fact is ‘material’ only if it might affect the
 16 outcome of the case, and a dispute is ‘genuine’ only if a reasonable trier of fact could
 17 resolve the issue in the non-movant’s favor.” *Fresno Motors, LLC v. Mercedes Benz USA,*
 18 *LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 19 242, 248 (1986)). The court must view the evidence in the light most favorable to the
 20 nonmoving party and draw all reasonable inferences in the nonmoving party’s favor.
 21 *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

22 The moving party “bears the initial responsibility of informing the district court of
 23 the basis for its motion, and identifying those portions of [the record] . . . which it believes
 24 demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 232.
 25 When the moving party does not bear the ultimate burden of proof, it “must either produce
 26 evidence negating an essential element of the nonmoving party’s claim or defense or show
 27 that the nonmoving party does not have enough evidence of an essential element to carry
 28 its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.*,

1 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party carries this initial burden of
 2 production, the nonmoving party must produce evidence to support its claim or defense.
 3 *Id.* at 1103. Summary judgment is appropriate against a party that “fails to make a showing
 4 sufficient to establish the existence of an element essential to that party’s case, and on
 5 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

6 In considering a motion for summary judgment, the court must regard as true the
 7 non-moving party’s evidence, as long as it is supported by affidavits or other evidentiary
 8 material. *Anderson*, 477 U.S. at 255. However, the non-moving party may not merely rest
 9 on its pleadings; it must produce some significant probative evidence tending to contradict
 10 the moving party’s allegations, thereby creating a material question of fact. *Id.* at 256–57
 11 (holding that the plaintiff must present affirmative evidence in order to defeat a properly
 12 supported motion for summary judgment); *see also Taylor v. List*, 880 F.2d 1040, 1045
 13 (9th Cir. 1989) (“A summary judgment motion cannot be defeated by relying solely on
 14 conclusory allegations unsupported by factual data.” (citation omitted)).

15 **III. Analysis**

16 **A. Discrimination Claims**

17 Plaintiff alleges three counts of discrimination based on her HIV-positive status in
 18 the Amended Complaint: (1) violation of the FHA, (2) violation of the AFHA, and
 19 (3) violation of Title III of the ADA. (Am. Compl. ¶¶ 23–43.) In her Motion, Plaintiff
 20 argues that the evidence undisputedly shows that her discharge from Defendant’s facility
 21 qualifies as unlawful discrimination under the FHA, AFHA, and ADA because it was
 22 triggered by her HIV-positive diagnosis. (*See generally* Am. Compl.) Plaintiff thus
 23 contends she is entitled to summary judgment as to Defendant’s liability. In its Motion,
 24 Defendant argues that the undisputed evidence shows its decision to discharge Plaintiff
 25 was justified—and thus not unlawful discrimination—because (1) Plaintiff failed to request
 26 accommodation and Defendant’s duty to determine whether the requested accommodation
 27 could be reasonably provided was not triggered, (2) the decision was permitted by the
 28 Arizona Administrative Code, and (3) Plaintiff presented a direct threat to the health or

1 safety of others that warranted her removal from the facilities. (D. Mot. at 10–12; D. Resp.
 2 at 2.) Defendant thus seeks summary judgment in its favor.

3 Because the FHA, AFHA, and ADA have substantially similar standards for
 4 discrimination and they are so grouped in the parties' briefing, the Court will discuss them
 5 together. *See Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1157 (9th
 6 Cir. 2013) (“The standards regarding disparate treatment claims under the ADA are
 7 typically identical [to the FHA], and courts accordingly interpret them in tandem.” (citation
 8 omitted)); *Sottile v. Watermark Retirement Cmty. Inc.*, 2018 WL 6318351, No. CV-15-
 9 02584-PHX-DJH at *6 (D. Ariz. July 23, 2018) (“In interpreting the Arizona Fair Housing
 10 Act, Arizona state courts follow federal court interpretations because the Arizona Fair
 11 Housing Act was modeled after the Federal Fair Housing Act.”).

12 Title III of the ADA provides that “[n]o individual shall be discriminated against on
 13 the basis of disability in the full and equal enjoyment of the goods, services, facilities,
 14 privileges, advantages, or accommodations of any place of public accommodation.” 42
 15 U.S.C. § 12182(a). In *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019), the court held
 16 a “but for” causation standard must be applied when evaluating claims under Title I of the
 17 ADA, abrogating case law holding that a “motivating factor” causation standard applied in
 18 ADA discrimination claims.¹ Under the “but for” causation standard, “an action ‘is not
 19 regarded as a cause of an event if the particular event would have occurred without it.’”
 20 *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013). Although the Court’s
 21 research did not reveal a decision in the Ninth Circuit applying *Murray*’s ruling to Title III
 22 of the ADA specifically, there is nothing to indicate that the “but for” test should not apply,
 23 especially since Title I and Title III both use the phrase “on the basis of disability.” 42
 24 U.S.C. §§ 12112(a), 12182(a). Other circuit courts have similarly applied the “but for”
 25 causation standard to claims under Title III of the ADA. *See Doe v. R. I. Interscholastic*
 26 *League*, 137 F.4th 34, 41 (1st Cir. 2025) (“Under [...] Title III, the burden is on the plaintiff

27
 28 ¹ Though the ‘but for’ standard was not briefed by the parties, it is now the primary
 test for ADA and FHA claims in the Ninth Circuit and thus will be applied in the instant
 case.

1 to show that the disability is the cause-in-fact, or “but-for” cause, of the plaintiff’s
 2 exclusion.”); *A.H. by Holzmueller v. Ill. High School Ass’n.*, 881 F.3d 587, 592–93 (7th
 3 Cir. 2018) (Title III “prohibit[s] discrimination against individuals ‘by reason of’ the
 4 disability, or ‘on the basis of’ the disability,” requiring plaintiff “to prove that, but for his
 5 disability, he would have been able to access the services or benefits desired.”).

6 Similar to Title III of the ADA, the FHA makes it unlawful to “discriminate against
 7 any person” in the act of selling or renting a dwelling or providing access to its facilities
 8 “because of a handicap of [. . .] that person.” 42 U.S.C. § 3604(f)(2) (emphasis added). The
 9 FHA’s phrase ‘because of’ mirrors the ADA’s “on the basis of” verbiage and is consistent
 10 with the practice of courts to treat FHA and ADA claims substantially similarly. 42 U.S.C.
 11 § 12182(a); *see Pac. Shores Props., LLC*, 730 F.3d at 1157. “We see no meaningful textual
 12 difference between [on the basis of] and the term[] ‘because of’ [. . .]—terms that the
 13 Supreme Court has explained connote ‘but for’ causation.” *Gentry v. E. W. Partners Club*
 14 *Mgmt. Co. Inc.*, 816 F.3d 228 (4th Cir. 2016) (citing *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S.
 15 at 350 (“[T]he ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’
 16 (citations omitted))).

17 **1. FHA and ADA Discrimination**

18 With regard to Plaintiff’s claims that her discharge from Defendant’s facilities was
 19 a discriminatory act in violation of the FHA and ADA, (Am. Compl. ¶¶ 23–43), Plaintiff
 20 argues that there is no factual dispute as to whether her discharge constitutes discrimination
 21 under those statutes because (1) the timing of her discharge aligned with the disclosure of
 22 her diagnosis to Defendant’s staff, and (2) in his deposition, Defendant’s owner Russell
 23 Appleton indicated that Plaintiff’s discharge was specifically because of her HIV
 24 diagnosis. (Pl. Mot. at 9; Pl. SOF Ex. 8 (Appleton Deposition) at 49:25, 50:1–3.)

25 The FHA and ADA prohibit discrimination “because of” or “on the basis of” an
 26 individual’s disability that prevents her from participating in “full and equal enjoyment” of
 27 a facility. 42 U.S.C. § 3604(f)(2); 42 U.S.C. § 12182(a). Accordingly, to prevail on a claim
 28 under either statute, a plaintiff must establish that she was prevented from participating in

1 or benefiting from a facility or service and that “but for” her disability, such exclusion
 2 would not have occurred. *See Murray*, 934 F.3d at 1105; 42 U.S.C. § 3604(f)(2); 42 U.S.C.
 3 § 12182(a). Defendant contends that there is an additional element, existing only by
 4 implication in case law, requiring that a plaintiff first make a request for accommodation
 5 before a facility’s “duty to determine whether those requested accommodations could be
 6 reasonably provided” is triggered. (D. Mot. at 11–12 (citing *Nolan v. Starlight Pines*
 7 *Homeowners Ass’n*, 167 P.3d 1277, 1283 (Ariz. Ct. App. 2007)); D. Resp. at 2.) However,
 8 the Court agrees with Plaintiff that liability for a failure to make reasonable
 9 accommodations does not necessarily hinge on a requirement that the plaintiff first
 10 requested such accommodations. (Pl. Resp. at 6.) “It is axiomatic that an entity’s duty to
 11 look into and provide a reasonable accommodation may be triggered when the need for
 12 accommodation is obvious, even if no request has been made.” *Bax v. Doctors Med. Ctr.*
 13 *of Modesto, Inc.*, 52 F.4th 858, 869 (9th Cir. 2022).

14 The parties do not dispute that Plaintiff’s HIV-positive status constitutes a disability
 15 protected under both the FHA and ADA or that Defendant is an entity subject to the
 16 statutes. (Pl. Mot. at 6–8; D. Resp. at 2.) What remains at issue is whether Plaintiff’s HIV-
 17 positive status was the “but for” cause of her discharge. Plaintiff argues that the timing of
 18 her discharge, as well as Appleton’s testimony, indicate that her discharge occurred solely
 19 because of her HIV diagnosis. (Pl. Mot. at 9.) Because her argument regarding timing relies
 20 merely on a suggested inference, it is not by itself dispositive. As for the second argument,
 21 Plaintiff cites Appleton’s deposition, in which he stated that Plaintiff’s discharge was
 22 “based on her condition, her other conditions as well as having HIV [sic].” (Appleton
 23 Deposition at 49:25, 50:1–3.) Plaintiff also points to the Daily Progress Note written about
 24 her on November 4, 2022, in which one of Defendant’s staff wrote that “HIV is a factor
 25 for the decision but not the entire reason for discharge.” (D. SOF Ex. 17, Daily Progress
 26 Note.) For its part, Defendant contends that the evidence shows that Plaintiff was
 27 discharged not because of her HIV diagnosis but rather because its facility and employees
 28 had a total lack of experience in “handl[ing] Plaintiff’s needs” and she required a “more

1 robust program” that could treat both alcohol and drug addiction. (D. Mot. at 11; D. SOF
 2 ¶¶ 38–72, 74, Exs. 17, 18, 22.)

3 Considering the evidence proffered by the parties, a genuine issue of material fact
 4 remains as to whether Plaintiff’s discharge from Defendant’s facility would not have
 5 occurred in the absence of her HIV-positive diagnosis. As a result, neither party is entitled
 6 to summary judgment as to Defendant’s liability for discrimination under the FHA, the
 7 AFHA, or the ADA.

8 **2. Permissibility of Discharge**

9 Defendant also argues that two affirmative defenses apply to Plaintiff’s
 10 discrimination claims: (1) the Arizona Administrative Code permits and supports
 11 Defendant’s decision to discharge Plaintiff in favor of a higher level of care, and
 12 (2) Plaintiff posed a direct threat to others in the facility that warranted her discharge. (D.
 13 Mot. at 10–13.)

14 **a. Arizona Administrative Code**

15 In defense of its decision to discharge Plaintiff and transfer her to a facility that
 16 could meet her requirement for a “higher level of care,” (D. Mot. at 10–11), Defendant
 17 cites the Arizona Administrative Code (“AAC”), which provides that “[a]n administrator
 18 shall ensure that a resident is discharged from a behavioral health residential facility when
 19 the resident’s treatment needs are not consistent with the services that the behavioral health
 20 residential facility is authorized and able to provide.” Ariz. Admin. Code § 9-10-79 (C).
 21 Defendant maintains that its facility was “not intended to treat drug addiction” and its
 22 “programming was more focused on treating alcoholics.” (D. Mot. at 7.) With regard to its
 23 contention that its facility was unable to “handle” Plaintiff’s needs, Defendant points to
 24 “numerous records generated by Olive Branch” as to Plaintiff’s need for elevated care. For
 25 example, in Appleton’s November 4, 2022, Daily Progress Note, he states that her needs
 26 “out pace[] [sic] the skill or ability my team possesses,” (Daily Progress Note), and in an
 27 Incident Report of the same date, Appleton wrote that Plaintiff’s “underline [sic] condition
 28 of PTSD and recent suicide attempt may be beyond our ability to provide adequate mental

1 health care" and "[the facility] lack[s] the experience and necessary protocols to elevate
 2 monitoring" as "required." (D. SOF ¶¶ 68–70, 71, 72, 74, Exs. 17, 18.)

3 In her Response, Plaintiff cites Defendant's Policies and Procedures Manual to
 4 argue that Defendant offers treatment for a broad umbrella of disorders of substance abuse
 5 and addiction. (Pl. Resp. at 5–6; Pl. SOF Ex. 1 at 7, Manual.) She points to the "Scope of
 6 Services" section of the Manual to suggest that drug addiction is covered by Defendant's
 7 treatment options, since the facility's stated "mission" is to assist those with "diagnosed
 8 mental health disorder(s) and co-occurring disorders of substance abuse and/or addiction."
 9 (Manual at 7.) Plaintiff also cites her intake form, in which her initial "diagnostic
 10 impressions" included her "opioid use disorder" and suicidal ideations, to argue that
 11 Defendant was aware of her needs at intake and chose to admit her regardless. (Doc. 77,
 12 Exs. to Pl. SOF, Ex. 5.)

13 Determining whether the additional needs cited by Defendant fall within the scope
 14 of its services as cited by Plaintiff—and thus whether Defendant has a valid affirmative
 15 defense under the AAC—is a question for a factfinder. Neither party has "produce[d]
 16 evidence negating an essential element" of the other party's claim or defense, as is required
 17 to satisfy the summary judgment standard. *Nissan Fire & Marine*, 210 F.3d at 1102.

18 **b. Direct Threat**

19 Defendant also contends that its undisputed evidence shows that it "was permitted
 20 to discharge Plaintiff" because she "posed a direct threat to the health or safety of others."²
 21 (D. Mot. at 12 (citing 42 U.S.C. § 12182(3))).) The ADA defines a direct threat as "a
 22 significant risk to the health or safety of others that cannot be eliminated by a modification
 23 of policies, practices, or procedures or by the provision of auxiliary aids or services." 42

25 ² Plaintiff argues that Defendant should not be permitted to use direct threat as a
 26 defense because it failed to allege it as an affirmative defense in its pleading, as required
 27 by Fed. R. Civ. 8(c). (Pl. Resp. at 8.) However, "[a]lthough Rule 8 requires affirmative
 28 defenses to be included in responsive pleadings, absent prejudice to the plaintiff, the district
 court has discretion to allow a defendant to plead an affirmative defense in a subsequent
 motion." *Simmons v. Navajo Cnty.*, 609 F.3d 1011, 1023 (9th Cir. 2010), *overruled on
 other grounds by Castro v. City of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc).
 Plaintiff demonstrates no prejudice resulting from Defendant's assertion of the affirmative
 defense of direct threat, so the Court will consider the defense.

1 U.S.C. § 12182(b)(3). “The existence, or nonexistence, of a significant risk must be
 2 determined from the standpoint of the person who refuses the treatment or accommodation,
 3 and the risk assessment must be based on medical or other objective evidence.” *Bragdon*
 4 *v. Abbott*, 524 U.S. 624, 649 (1998).

5 In support of its argument, Defendant points only to evidence that it consulted with
 6 THS and relied on THS’s medical expertise to determine that Plaintiff posed a significant
 7 enough risk to warrant discharge. (D. Mot. at 12–13.) In neither its Motion nor its Response
 8 to Plaintiff’s Motion does Defendant cite evidence from the record—much less “medical
 9 or other objective evidence”—to support the direct threat defense or specify what risk
 10 Plaintiff posed. *Bragdon*, 524 U.S. at 649. For her part, Plaintiff cites various Center for
 11 Disease Control and National Institute of Health publications in her Motion that explain
 12 the risks that HIV-positive individuals do or do not pose within a community. She also
 13 points to the fact that Defendant was not performing any medical procedures on Plaintiff
 14 that would require the use of needles or sharing of bodily fluids to argue that her HIV-
 15 positive status posed no significant risk to the health or safety of others in the facility. (Pl.
 16 Mot. at 12; Appleton Deposition at 75:7–76:1.)

17 Although neither party cites substantial probative evidence, a genuine issue remains
 18 as to whether Plaintiff posed a direct threat that warranted her discharge, precluding
 19 summary judgment on Defendant’s asserted defense.

20 **B. Retaliation Claims**

21 In her Amended Complaint, Plaintiff claims that Defendant’s now-dismissed
 22 counterclaim of defamation in the instant suit constituted unlawful retaliation in violation
 23 of the FHA, AFHA, and ADA’s respective anti-interference provisions. (Am. Compl.
 24 ¶¶ 49–65.) In support, Plaintiff points to several emails sent from Defendant’s counsel at
 25 the time to her counsel, (Doc. 102, Exs. to Pl. Resp., Exs. Q (Email 1), R (Email 2)), and
 26 argues that those emails contain language constituting “threats” intended to convince
 27 Plaintiff to dismiss the instant suit. (Pl. Resp. at 11–12.)

28 . . .

1 The FHA and ADA provide that “[i]t shall be unlawful to coerce, intimidate,
 2 threaten, or interfere with any person in the exercise or enjoyment of” any right protected
 3 by the statute. 42 U.S.C. § 3617; 42 U.S.C. § 12203(b). A retaliation claim requires that
 4 the plaintiff make out a *prima facie* case by showing (1) involvement in a protected activity,
 5 (2) an adverse action, and (3) a “causal link between the two.” *Brown v. City of Tucson*,
 6 336 F.3d 1181, 1187, 1192 (9th Cir. 2003). “An ADA plaintiff must also demonstrate that
 7 she has suffered a distinct and palpable injury as a result of the threat.” *Id.* at 1193.

8 The parties do not dispute that the first element is satisfied through Plaintiff’s filing
 9 of the instant suit. *See Pardi v. Kaiser Found. Hosp.*, 389 F.3d 840, 850 (9th Cir. 2004)
 10 (holding that filing a civil lawsuit is a protected activity under the ADA). In dispute is
 11 whether the emails sent from Defendant’s counsel to Plaintiff’s counsel constitute an
 12 “adverse action” sufficient to establish a “threat[]” or “interfere[nce]” such that the FHA
 13 and ADA’s anti-interference provisions were violated. *Brown*, 336 F.3d at 1187; 42 U.S.C.
 14 § 3617; 42 U.S.C. § 12203(b). In *Brown v. City of Tucson*, the Ninth Circuit declined to
 15 “defin[e] precisely what constitutes interference,” but echoed the FHA and ADA’s anti-
 16 interference provisions in holding that it is “clearly [. . .] unlawful to threaten . . . any
 17 individual in the exercise or enjoyment of . . . any right granted or protected” by the statute.
 18 *Brown*, 336 F.3d at 1192. Both parties point to *Strojnik v. Kapalua Land Co. Ltd* for a
 19 definition of ‘interference’ or ‘threat’ in this context. The *Strojnik* court differentiated
 20 between a suit (or claim) filed in civil response and a suit (or claim) filed as an unlawful
 21 threat by looking to whether the verbiage used explicitly “threaten[s] the filing of charges
 22 [. . .] unless [a plaintiff] drops his [. . .] claims.” *Strojnik v. Kapalua Land Co. Ltd*, 379 F.
 23 Supp. 3d 1078, 1084–85 (D. Haw. 2019). The *Strojnik* court found no unlawful retaliation
 24 in part because “[n]o such threat [was] included in the correspondence” that showed that
 25 the defendants’ decision to file charges was based on Strojnik’s exercise of his rights. *Id.*

26 By contrast, in the instant case, a reasonable juror could find that a threat was
 27 included in the correspondence. Defendant’s counsel wrote in his November 21, 2023
 28 email that his client “has ample funds to afford a litigation attorney to countersue [Plaintiff]

[. . .], which is exactly what is going to happen **if this lawsuit isn't dismissed.**" (Email 2 at 1 (emphasis added).) Such verbiage suggests that the proposed countersuit was a threat initiated because of Plaintiff's exercise of her rights, and thus the two appear to be causally linked. Therefore, a reasonable juror could find that the emails regarding the proposed countersuit constituted interference under the FHA and ADA's anti-interference provisions. *See* 42 U.S.C. § 3617; *see* 42 U.S.C. § 12203(b).

Defendant argues that, regardless of whether the emails constituted a threat under the FHA and ADA, Plaintiff did not suffer the "distinct and palpable injury" required to establish unlawful retaliation. *See Brown*, 336 F.3d at 1193. In particular, Defendant points to Plaintiff's lack of inclusion on the email chains in question. (D. Mot. at 14; Email 1; Email 2.) An injury under the ADA's anti-interference provision "could consist of either the giving up of her ADA rights, or some other injury which resulted from her refusal to give up her rights, or from the threat itself." *Brown*, 336 F.3d at 1193. Time spent defending a "frivolous" lawsuit can constitute an injury. *Walker v. City of Lakewood*, 272 F.3d 1114, 1124 (9th Cir. 2001).

Although Plaintiff did not give up her ADA rights, she contends that Defendant's now-dismissed defamation countersuit was frivolous, such that any time spent defending it constituted the requisite injury to Plaintiff. (Pl. Mot. at 16–17.) With respect to whether Defendant's counterclaim for defamation was frivolous, in Arizona, "[t]o be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation." *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 787 (Ariz. 1989). "As a matter of law, a statement is not actionable if it cannot reasonably be interpreted as stating or implying facts susceptible of being proved true or false. Put simply, the plaintiff must show that the statement is provable as false before a defamation action can lie." *BLK III, LLC v. Skelton*, 506 P.3d 812, 817 (Ariz. Ct. App. 2022).

In support of her contention that the countersuit was frivolous, Plaintiff cites Appleton's deposition, in which he stated that Plaintiff was discharged because of her HIV

1 diagnosis and the risk she posed to the safety of others in the facility, (Appleton Deposition
 2 at 49:25, 50:1–3), to argue that any statement she made to the Phoenix New Times was
 3 “admittedly true” and not defamatory. (Pl. Mot. at 17.) However, as stated *supra*, genuine
 4 issues of fact remain as to the reasons for Plaintiff’s discharge, so Plaintiff’s statements
 5 were not “admittedly true.” As a result, Defendant’s counterclaim for defamation was not
 6 frivolous on its face.

7 The second element of defamation requires that the statements made bring the
 8 defamed entity into some level of disrepute or impeach its honesty or reputation.
 9 *Godbehere*, 783 P.2d at 787. In deciding whether a statement is defamatory, the Court
 10 determines, as a matter of law, whether a statement is “capable of bearing” the meaning
 11 alleged by the entity, and, if so, “whether that meaning is defamatory.” *Reynolds v.*
 12 *Reynolds*, 294 P.3d 151, 155 (Ariz. Ct. App. 2013) (quoting Restatement (Second) of Torts
 13 § 614(1) (Am. Law Inst. 1977)). Defendant alleges that Plaintiff “stated to the Phoenix
 14 New Times that she was removed from Olive Branch because she has HIV and this
 15 diagnosis made her ‘unsafe.’” (Answer at 6–7.) Plaintiff contends that she told the Phoenix
 16 New Times that Appleton “told [Olive Branch patients] a resident was HIV positive and
 17 that the facility was no longer ‘safe’ for them.” (Pl. Mot. at 17; Pl. SOF Ex. 11.) Plaintiff’s
 18 and Defendant’s construction of the statement is substantially similar, and the statement is
 19 “capable of bearing” the meaning alleged by Defendant in bringing the counterclaim.
 20 *Reynolds*, 294 P.3d at 155. Additionally, Defendant adequately alleged facts in its
 21 counterclaim raising the plausible inference that Plaintiff’s statement would bring
 22 Defendant’s facility into disrepute and impeach its reputation. *Godbehere*, 783 P.2d at 787.
 23 Thus, Defendant’s counterclaim was not frivolous as a matter of law, and any time spent
 24 by Plaintiff defending the counterclaim did not constitute a distinct and palpable injury as
 25 required to establish unlawful retaliation. *Brown*, 336 F.3d at 1193.

26 Plaintiff also argues that, regardless of the substance of the defamation claim, her
 27 statements to the Phoenix New Times were “absolutely privileged under the litigation
 28 privilege.” (Pl. Mot. at 17.) She contends that “[d]efamatory statements contained in

1 pleadings are absolutely privileged if they are connected with or have any bearing on or
 2 are related to the subject of inquiry.” (Pl. Mot. at 17 (quoting *Drummond v. Stahl*, 618 P.2d
 3 616, 619 (Ariz. Ct. App. 1980).) However, the next sentence of the *Drummond* court’s
 4 decision emphasizes that “parties to judicial proceedings are generally granted an absolute
 5 privilege to use defamatory language **in pleadings.**” *Drummond*, 618 P.2d at 619
 6 (emphasis added). Defendant’s defamation counterclaim did not focus on the substance of
 7 Plaintiff’s pleading, but rather on her statements made to the Phoenix New Times, making
 8 the litigation privilege inapplicable. (Answer at 6–7.)

9 Without an injury, Plaintiff has not established a retaliation claim as a matter of law.
 10 Accordingly, the Court finds that Plaintiff’s retaliation claims do not survive Defendant’s
 11 Motion for Summary Judgment.

12 **C. Public Disclosure Claim**

13 Finally, Plaintiff alleges that Defendant “publicly disclosed [her] HIV diagnosis
 14 with other Olive Branch residents without her knowledge or consent,” constituting a public
 15 disclosure of private facts for which Defendant should be held liable. (Am. Compl. at 8–
 16 9.) Arizona recognizes a cause of action for publicity given to private life when one
 17 publicizes “a matter concerning the private life of another” and “the matter publicized is
 18 one of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of
 19 legitimate concern to the public.” Restatement (Second) of Torts § 652D; *see Anthony v.*
 20 *United States*, 632 F. Supp. 3d 1017, 1038–39 (D. Ariz. Sept. 30, 2022). For a cause of
 21 action such as publicity given to private life, the Arizona Supreme Court “has adopted the
 22 rule that where not bound by its previous decisions or by legislative enactment, it would
 23 follow the Restatement of the Law.” *Reed v. Real Detective Pub. Co.*, 162 P.2d 133, 137
 24 (Ariz. 1945).

25 Plaintiff argues that (1) disclosure of an HIV diagnosis is highly offensive because
 26 it can cause things like psychological harm, and (2) Plaintiff’s HIV-positive status was not
 27 a legitimate matter of public concern because “a person’s health and private life are
 28 inherently private matters.” (Pl. Resp. at 13.) In support of her contention that Defendant

1 publicized her diagnosis, Plaintiff points to undisputed evidence of a group meeting during
 2 which Appleton informed the staff and residents of the facility that someone had been
 3 diagnosed with HIV. (D. SOF ¶ 63, Ex. 7 at 183:23–184:13.) However, the Restatement
 4 holds that ‘publicity’ in this context requires that “the matter is made public, by
 5 communicating it to the public at large, or to so many persons that the matter must be
 6 regarded as substantially certain to become public knowledge.” Restatement (Second) of
 7 Torts § 652D, cmt.a. It further provides that, in this context, “it is not an invasion of privacy
 8 [...] to communicate a fact concerning the plaintiff’s private life to a single person or even
 9 to a small group of persons.” *Id.* Plaintiff presents no evidence indicating that her HIV
 10 diagnosis had been shared with the public at large, and she thus has not shown that her
 11 diagnosis was publicized in the manner required for a publicity given to private life claim.
 12 Without the requisite publicity, Plaintiff has not established the *prima facie* elements as a
 13 matter of law. Accordingly, the Court finds that Plaintiff’s public disclosure claim does not
 14 survive Defendant’s Motion for Summary Judgment.

15 **D. Damages**

16 Plaintiff’s prayer for relief includes a request for punitive damages. Since the only
 17 claims that survive summary judgment are Plaintiff’s FHA, AFHA, and ADA
 18 discrimination claims (Counts One, Two, and Three), the Court will only discuss punitive
 19 damages with respect to those.

20 **1. FHA and AFHA Claims**

21 Though in a discussion of punitive damages, the FHA’s place in federal law and
 22 AFHA’s place in state law warrants some differentiation³ because the federal and Arizona
 23 standards regarding punitive damages are slightly different, the Court finds that under
 24 either standard, Plaintiff has not proffered the requisite facts to support the prayer for
 25 punitive damages for her FHA and AFHA claims.

26 The FHA provides that “if the court finds that a discriminatory housing practice has
 27 occurred [...], the court may award to plaintiff actual and punitive damages.” 42 U.S.C.

28 ³ The Court recognizes that the elements of and damages available under the FHA and AFHA are identical and intends to try the claims together.

1 § 3613. Under the FHA, a showing of reckless indifference is sufficient for plaintiffs to
 2 prevail on their punitive damages claim. *See The Fair Hous. Council of San Diego, Joann*
 3 *Reed v. Penasquitos Casablanca Owner's Ass'n*, 381 F. App'x 674, 676–77 (9th Cir.
 4 2010). “A finding of reckless indifference ultimately focuses on the actor’s state of mind,
 5 and requires that the defendant at least discriminate in the face of a perceived risk that its
 6 actions will violate federal law to be liable in punitive damages.” *Id.* at 677 (internal
 7 citations omitted) (quoting *Koldstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999)). The
 8 reckless indifference standard does not require that a defendant engage in “egregious”
 9 conduct to be liable for punitive damages. *Id.*

10 By contrast, the Arizona Supreme Court has held that punitive damages cannot be
 11 awarded “based on mere negligence, gross negligence, or recklessness.” *Swift Transp. Co.*
 12 *of Ariz. L.L.C. v. Carman*, 515 P.3d 685, 691–92 (Ariz. 2022) (citations omitted). Rather,
 13 a plaintiff must demonstrate the defendant’s “evil mind” by showing that his actions were
 14 outrageous and created a “substantial risk of tremendous harm to others.” *Id.* at 692. That
 15 is, a plaintiff must show that the defendant knowingly or intentionally disregarded an
 16 unreasonable risk of harm and appreciated its severity before deliberately ignoring it. *Id.*
 17 at 693. Therefore, absent affirmative evidence of malice, a plaintiff generally must prove
 18 the requisite “evil mind” by demonstrating that the defendant continued a course of conduct
 19 with knowledge of the harm caused or to be caused by that conduct. *Id.* at 692–93.

20 Plaintiff argues that both the ‘reckless indifference’ and ‘evil mind’ standards are
 21 met. (Pl. Resp. at 15.) In support of both standards, she points to Defendant’s Policies and
 22 Procedures Manual to argue that Defendant “knew state and federal law prohibited
 23 discrimination on the basis of disability” and ignored such illegality in choosing to
 24 discharge Plaintiff. (Pl. Resp. at 15; *see* Manual.) However, no reasonable juror could
 25 conclude that the Manual by itself shows that Defendant was aware of a potential risk of
 26 harm posed by discharging Plaintiff based in part on her HIV-positive diagnosis, or that
 27 Defendant deliberately ignored that risk conducting the discharge. Accordingly, Plaintiff
 28 has presented insufficient evidence to prove that Defendant discharged her with an ‘evil

1 mind,’ and thus the Arizona standard to warrant punitive damages for Plaintiff’s AFHA
 2 claim has not been met.

3 The Manual is similarly not sufficiently probative of a ‘reckless indifference’
 4 showing. Though under this standard Plaintiff is not required to prove that Defendant
 5 engaged in “egregious” conduct, Plaintiff still must prove that defendant “discriminate[d]
 6 in the face of a perceived risk that its actions will violate federal law.” *The Fair. Hous.*
 7 *Council of San Deigo*, 381 F. App’x at 677. Again, no reasonable juror could conclude that
 8 the evidence presented by Plaintiff—Defendant’s Policies and Procedures Manual—by
 9 itself proves Defendant’s (1) perception of a risk or (2) choice to discriminate against
 10 Plaintiff “in the face” of such risk. Accordingly, Plaintiff’s evidence is insufficient to prove
 11 that Defendant discharged her with ‘reckless indifference,’ and thus the federal standard to
 12 warrant punitive damages for Plaintiff’s FHA claim has not been met. Accordingly,
 13 Defendant is entitled to summary judgment on Plaintiff’s prayer for punitive damages.

14 **2. ADA Claim**

15 Although Plaintiff also requests punitive damages for her claim under Title III of
 16 the ADA, “[d]amages are not recoverable under Title III of the ADA—only injunctive
 17 relief is available for violations of Title III.” *Wander v. Jaus*, 304 F.3d 856, 858 (9th Cir.
 18 2002) (citing 42 U.S.C. §§ 12188(a)(1), 2000a-3(A)). Thus, Plaintiff cannot recover
 19 monetary damages—either actual or punitive—on her Title III discrimination claim.

20 In the Amended Complaint, Plaintiff makes no mention of injunctive relief,
 21 although she does pray for “any other relief that is just and proper.” (Am. Compl. at 11.)
 22 The Ninth Circuit has held that relief that was not demanded in pleading may still be
 23 awardable so long as it is proper. *See Jet Inv., Inc. v. Dept. of Army*, 84 F.3d 1137, 1143
 24 (9th Cir. 1996) (holding that a general prayer for relief, such as “further relief as may be
 25 proper in the circumstances,” can provide sufficient notice of a later request for damages);
 26 *K. J. by and through Johnson v. Johnson*, 127 F.4th 1239, 1251–52 (9th Cir. 2025)
 27 (awarding expungement even though it was not specifically included in the plaintiff’s
 28 prayer for relief). Because injunctive relief is the only option available to Plaintiff under

1 Title III, any monetary relief (as demanded in the Complaint) available for Plaintiff's
 2 discrimination claims, if granted by the factfinder, necessarily stems from the FHA claim,
 3 which is duplicative in substance to the Title III claim. Additionally, because the granting
 4 of equitable relief is a responsibility of the Court, not a fact finder, there is no relief under
 5 the ADA claim that can proceed to a jury trial. *See Teitscher v. Woodson*, 835 F.3d 936,
 6 944–45 (9th Cir. 2016) (“[B]ecause of the wholly equitable nature” of the claim at issue,
 7 the plaintiff “had no right to a jury trial on that claim.”); *Sherman v. Burke Contracting,
 8 Inc.*, 891 F.2d 1527, 1592 n.4 (11th Cir. 1990) (With respect to a claim that lies in equity,
 9 “the jury could serve in an advisory capacity only.”). As a result, although the Court will
 10 not grant summary judgment to Defendant on Plaintiff's discrimination claim under Title
 11 III of the ADA, the Court will hold a jury trial for only the FHA and AFHA discrimination
 12 claims, which mirror each other. If the jury finds Defendant is liable for discrimination, the
 13 parties may make any additional arguments related to injunctive relief under Title III to the
 14 Court after the departure of the jury.

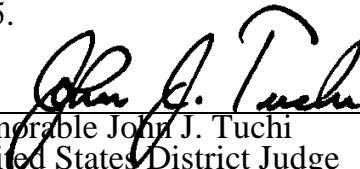
15 **IT IS THEREFORE ORDERED** granting in part Defendant's Motion for
 16 Summary Judgment (Doc. 71). Defendant is entitled to summary judgment with respect to
 17 Plaintiff's public disclosure claim (Count Four), retaliation claims (Counts Five, Six, and
 18 Seven), and prayer for punitive damages, but not with respect to Plaintiff's discrimination
 19 claims (Counts One, Two, and Three).

20 **IT IS FURTHER ORDERED** denying Plaintiff's Partial Motion for Summary
 21 Judgment (Doc. 73).

22 **IT IS FURTHER ORDERED** that Counts One and Two for discrimination under
 23 the Fair Housing Act and Arizona Fair Housing Act will proceed to a jury trial. Although
 24 Plaintiff may not seek damages in conjunction with Count Three for discrimination under
 25 Title III of the Americans with Disabilities Act, if the jury finds Defendant is liable for
 26 discrimination, the parties may make any additional arguments related to injunctive relief
 27
 28

1 to the Court after the departure of the jury. The Court will set a pre-trial status conference
2 by separate Order.

3 Dated this 8th day of August, 2025.

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Honorable John J. Tuchi
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United States District Judge